



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

Docket No. ETA-2020-0006

RIN 1205-AC00

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States, Implementation of Vacatur

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This final rule effectuates a Federal district court order vacating a January 14, 2021 final rule.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]. As of [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER], the Final Rule published on January 14, 2021, at 86 FR 3608, delayed on March 12, 2021, at 86 FR 13995, and further delayed May 13, 2021, at 86 FR 26164, is withdrawn. The Final Rule published on May 13, 2021, at 86 FR 26164, is also withdrawn.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

SUPPLEMENTARY INFORMATION:

I. Background and Basis for Removal of Regulations

On October 8, 2020, the Department of Labor (Department) published an Interim Final Rule¹ (IFR or October 2020 IFR), amending Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that U.S. employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H-1B, H-1B1, or E-3 nonimmigrant visas. The Department published the October 2020 IFR with an immediate effective date, bypassing pre-promulgation notice and comment, but requesting public input during a post-promulgation 30-day public comment period. Four groups of plaintiffs separately challenged the Department's IFR and, on December 1, 3, and 14, 2020, respectively, the IFR was set aside or enjoined by three district courts on procedural grounds.² Subsequently, on January 14, 2021, the Department published a Final Rule³ in the **Federal Register** (Final Rule or January 2021 Final Rule), which adopted changes to the IFR. Although the Final Rule contained an effective date of March 15, 2021, the Department also included two sets of transition periods under which adjustments to the new wage levels would not begin until July 1, 2021. The Department twice delayed the effective date of the Final Rule,⁴ and, on June 23, 2021, before the Final Rule took effect, the U.S. District Court for the Northern District of California entered an order vacating and remanding the Final Rule.⁵ In light of the court's order, the Department has already announced that the operative version of the Code of Federal Regulations (CFR) at 20 CFR 656.40 and 20 CFR 655.731 continues to be the text in place on October 7, 2020, prior to the publication of the IFR.⁶

¹ *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872, (Oct. 8, 2020).

² *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 86 FR 3608, 3612 (Jan. 14, 2021) (discussing cases).

³ 86 FR 3608.

⁴ 86 FR 13995 (Mar. 12, 2021); 86 FR 26164 (May 13, 2021).

⁵ See Order Granting Defendants' Motion for Voluntary Remand with Vacatur, *Chamber of Commerce, et al. v. Dep't of Homeland Sec., et al.*, No. 20-cv-07331 (N.D. Cal. June 23, 2021), ECF No. 139.

⁶ Announcements, *OFLC Announces Updates to Implementation of the Final Rule Affecting Wages for H-1B and PERM Workers; District Court's Order Vacating Final Rule* (June 29, 2021), available at <https://www.dol.gov/agencies/eta/foreign-labor/news>.

However, changes to the regulatory text resulting from the now-vacated rulemaking are still reflected in the CFR at 20 CFR parts 655 and 656.

This rule removes from the CFR the regulatory text that the Department promulgated through the rulemaking in October 2020, and restores the regulatory text to appear as it did before the IFR's effective date.

The Department is not required to provide notice and comment or delay the effective date of this rule, because the changes made simply implement the courts' orders, including the vacatur of the January 2021 Final Rule, and restore the regulatory text so that it correctly reflects the operative regulatory text in place prior to publication of the now-vacated rulemaking. Moreover, good cause exists here for bypassing any otherwise applicable requirements of notice and comment and a delayed effective date. Notice and comment and a delayed effective date are unnecessary for the implementation of the court's order vacating the rule and would be contrary to public interest in light of the agency's need to implement the final judgment. *See* 5 U.S.C. 533(b)(B), (d). The Department believes that delaying the ministerial act of restoring the regulatory text in the **Federal Register** is contrary to the public interest because it could lead to confusion, particularly among the regulated public, as to the applicable prevailing wage methodology. The Department has concluded that each of those three reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest—independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Australia, Chile, Employment, Employment and training, Immigration, Labor, Migrant labor, Wages.

20 CFR Part 656

Administrative practice and procedure, Employment, Foreign workers, Labor, Wages.

DEPARTMENT OF LABOR

Accordingly, for the reasons stated in the preamble, the Department of Labor amends parts 655 and 656 of chapter V, title 20, Code of Federal Regulations, as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Amend § 655.731 by revising paragraphs (a)(2)(ii) introductory text, (a)(2)(ii)(A) introductory text, and (a)(2)(ii)(A)(2) to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(a) * * *

(2) * * *

(ii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(2), and (b)(3)(iii)(C)(2) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests, but shall do so in accordance with these regulatory provisions and Department guidance. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. Upon receipt of a written request for a PWD on or after January 1, 2010, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arm's length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC

shall determine the wage in accordance with secs. 212(n) and 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

* * * * *

(2) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H-2B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

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PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

3. The authority citation for part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p)(1); sec.122, Public Law 101-649, 109 Stat. 4978; and Title IV, Public Law 105-277, 112 Stat. 2681.

4. Amend § 656.40 by revising paragraphs (a) and (b)(2) and (3) to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having jurisdiction over the

area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) * * *

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

(3) If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

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Angela Hanks,

Acting Assistant Secretary for Employment and Training, Labor.

